

No. 42811-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON


THE BERT KUTY REVOCABLE LIVING TRUST,
by its TRUSTEE DAVID NAKANO

Appellant (Plaintiff),

vs.

GERRY and JOHN DOE MULLEN, et al.,

Respondents (Defendants)

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

BRIEF OF RESPONDENTS ROBERT AND DANIELE HAYES

Michael W. Johns
WSBA No. 22054
Attorneys for Respondents,
Robert and Daniele Hayes

ROBERTS JOHNS & HEMPHILL, PLLC
7525 Pioneer Way, Suite 202
Gig Harbor, Washington 98335
Telephone No. (253) 858-8606
Facsimile No. (253) 858-8646

ORIGINAL

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A. COUNTERSTATEMENT OF FACTS


The Appellant Bert Kutty Revocable Living Trust, by its Trustee David Nakano (hereinafter referred to as the "Trust") filed this lawsuit on July 2, 2008. The Trust thereafter, on November 14, 2008, filed an amended complaint. In both the original complaint and the subsequent amended complaint, the Trust affirmatively alleged that the Respondents Robert and Daniele Hayes (hereinafter referred to as the "Hayes") had made affirmative misrepresentations to the Trust's trustee prior to the Trust's sale of the property to New Enterprise, LLC. The Trust further alleged that the Hayes had engaged with the other defendants named in the lawsuit in a "conspiracy" to commit "equity stripping fraud" designed to steal the Trust's equity by first convincing the Trust to take a second deed of trust on the property, and then foreclosing a first deed of trust for an inflated amount beyond the amount actually loaned. (CP 1-8; 259-267)

On April 30, 2008 - over two months prior to filing this lawsuit - the Trust through its original attorney, Mark Scheibmeir, sent a letter to the Hayes' attorney, who was at that time serving as the successor trustee handling the non-judicial foreclosure of the first deed of trust owned by the Hayes. (CP 177) Mr. Scheibmeir was in

possession of the Notice of Trustee's Sale that had been sent to the Trust informing it of the non-judicial foreclosure. In his letter Mr. Scheibmeir requested evidence that the principal amount claimed due in the Notice of Trustee's Sale had actually been loaned to New Enterprise. The Notice of Trustee's Sale listed an unpaid balloon payment of \$48,775.57 in outstanding principal and interest, \$2,438.78 in late fees, \$133.63 in non-default interest following the due date of the balloon payment and \$12,376.64 in default interest. (CP 168-172)

On May 9, 2008, the Hayes' attorney sent to Mr. Scheibmeir documentation of the original \$40,000.00 in loan disbursements. (CP 179-182) Mr. Scheibmeir was apparently satisfied with the documentation and did not ask for any further documentation or have any further role in this matter.

Instead, on June 11, and again on June 12, 2008, the Trust's current attorney wrote two more letters to the Hayes' attorney, again requesting copies of the same documentation previously provided to Mr. Scheibmeir. (CP 184-185) On June 19, 2008, the Hayes' attorney forwarded copies of the same documentation to the Trust's counsel. (CP 187)




Thus, long before the Trust filed its original complaint, much less its later amended complaint, the Trust and its attorney were fully aware that the Hayes were seeking only to foreclose based on the amount of the loan actually made, not some inflated amount as alleged in the complaint. And, despite the specific allegations in the complaint to the contrary, the Trust and its attorney were also aware that the Hayes had never met or spoken with the Trust's trustee, much less made any representations to the trustee prior to the Trust's sale of its property to New Enterprise, LLC. (CP 279) Despite being fully aware that there was therefore absolutely no factual basis for the alleged "equity stripping fraud", at least with respect to the Hayes, the Trust and its attorney nonetheless filed this lawsuit against the Hayes.

The Trust's original complaint sought to rescind the trustee's sale based on the claimed fraud. Despite this, the plaintiff did not either appear at the sale to bid on the property or seek to stay the sale pursuant to RCW 61.24.130. On July 25, 2008, the Hayes' attorney conducted the trustee's sale of the property. There were no bidders at the sale, so the property was sold to the Hayes and a trustee's deed was issued to them. (CP 166)

Because under Washington law the Trust had waived any challenge to either the validity of the trustee's sale or the validity of the debt secured by the deed of trust by failing to stay the sale, the Hayes moved for summary judgment. (CP 191-198) At the hearing on the Hayes' motion, the Trial Court found that the Trust had indeed waived its right to challenge the sale and dismissed the Trust's claims regarding both the validity of the trustee's sale and the debt foreclosed upon. (CP 255-258) However, based on the Trust's counsel's claim that he needed an opportunity to conduct discovery, and on the Trust's factual allegations regarding Mr. Hayes' supposed affirmative representations to the Trust's trustee, the Trial Court denied the remainder of the Hayes' motion. The Trial Court further granted the Trust's motion to amend its complaint to include a new claim for an accounting from the Hayes of alleged proceeds from the trustee's sale.


Following the Trust's discovery, the Hayes again moved for summary judgment. (CP 281-288) In their pleadings, the Hayes documented that they had not been involved in the original transaction, having only purchased their interest in the deed of trust after the transaction had been completed. (CP 280) The Hayes pointed out that they had indeed never met the Trust's trustee,



much less made any representation to him. (CP 279) Moreover, the Trust's claim for an accounting from the Hayes was not only factually without merit, it was directed at the wrong party, as only the trustee, not the beneficiary of a deed of trust or a purchaser at a trustee's sale, has any duty to account for surplus proceeds pursuant to the provisions of Chapter 61.24 RCW.

Though the Trust strenuously opposed the Hayes' motion to dismiss its claim for an accounting, it raised no objection to the dismissal of its fraudulent misrepresentation claim. Instead, it asserted that though it had no evidence to support its misrepresentation claim - and indeed had recently "discovered" evidence that the Hayes had not been involved in the original transaction and thus could not have had any role in the misrepresentations claimed in the Trust's complaint - the dismissal should be without prejudice. (CP 289-298) The Trial Court granted the Hayes' renewed motion for summary judgment, dismissing all of the plaintiff's claims against the Hayes with prejudice, finding there was absolutely no evidence to support any of those claims. (CP 310-312)

The Hayes thereafter moved for an award of attorney's fees against the Trust under CR 11 and RCW 4.84.185. (CP 319-326)



The Hayes submitted a declaration from their attorney setting forth the hourly rate charged to the Hayes and the amount of time spent on the case, which included an attached billing summary detailing how the time had been incurred. (CP 313-318) The Trust opposed the motion, but did not in its response memorandum challenge either the time spent or the rate charged by the Hayes' attorney (CP 327-332), though in an accompanying declaration the Trust's attorney opined that the Hayes should not be awarded fees greater than \$3,172.00. (CP 333-338)

After considering the Trust's response to the motion, the Trial Court found that there was absolutely no factual basis for the Hayes' alleged involvement in the "equity stripping fraud" complained of in the Trust's complaint. (CP 342) The Trial Court further found that the Trust's claim for an accounting was not only factually without merit – there having been no monies paid at the sale - it was directed at the wrong party, because only the trustee, not the beneficiary of a deed of trust or a purchaser at a trustee's sale, has any duty to account for surplus proceeds pursuant to the provisions of Chapter 61.24 RCW. (CP 342-343)

Based on the above findings, the Trial Court concluded that the Trust's counsel failed to adequately investigate or make

reasonable inquiry into the facts supporting the Trust's complaint, and further ignored the facts he did obtain and included clearly false claims in the two complaints he filed in this matter, and further that the claims made by the Trust against the Hayes were frivolous and advanced without reasonable cause. (CP 343)

B. ARGUMENT

1. Standard of Review.

The Trust correctly notes in its brief that when reviewing an order granting summary judgment, the Court of Appeals engages in the same inquiry as the Trial Court. Failor's Pharmacy v. DSHS, 125 Wn.2d 488, 493, 886 P.2d 147 (1994). The primary purpose of a summary judgment rule is to secure a just, speedy and inexpensive determination of every action by avoiding unnecessary trial. Mayberry v. City of Seattle, 53 Wn.2d 716, 336 P.2d 878 (1959).

Thus, where there is no genuine issue of material fact, granting summary judgment is proper. Tradewell Stores v. Fidelity Cas. Co. of New York, 67 Wn.2d 919, 410 P.2d 782 (1966). A material fact is one upon which the outcome of the litigation depends. Amant v. Pacific Power & Light Co., 10 Wn.App. 785, 520 P.2d 481 (1974). Once the moving party has met its burden of offering evidence showing that it is entitled to a judgment as a

matter of law, the burden shifts to the non-moving party to set forth facts showing that there is a genuine issue for trial. Graves v. P.J. Taggares Co., 94 Wn.2d 298, 616 P.2d 1223 (1980). A party may not rest upon pleadings or assertions, but must present evidence of fact on which that party relies. Leland v. Frogge, 71 Wn.2d 197, 427 P.2d 724 (1976).

If a plaintiff's response "fails to make a showing sufficient to establish the existence of an element essential to his case," then defendants' motion for summary judgment should be granted. Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). When plaintiff fails to establish the existence of an essential element of its case, then there is no genuine issue as to any material fact and summary judgment is appropriate. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

The Court of Appeals may affirm the Trial Court's judgment "on any grounds established by the pleadings and supported by the record." Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wash.2d 751, 766, 58 P.3d 276 (2002); In re Marriage of Rideout, 150 Wash.2d 337, 77 P.3d 1174 (2003).

2. The Court Did Not Err In Dismissing The Trust's Claims For An Accounting.

The Trust's claims for an accounting were based on a wholesale misunderstanding of how a trustee's sale is conducted under Chapter 61.24 RCW. The Trust thus alleged in its First Amended Complaint that the Hayes "tendered the deed of trust for its face value" to purchase the property at the Trustee's Sale, and that the Hayes as a result are somehow required to account for an alleged surplus "in excess of the entire obligation owed to the [Trust]. (CP 265) The Trust's allegations were and are nonsensical.

In making these allegations the Trust completely ignores the actual statutes defining how the non-judicial foreclosure process works, and indeed fails to cite to any authority whatsoever to support its assertion that a beneficiary at a trustee's sale somehow realizes a profit if it is the successful bidder at a trustee's sale and the "face amount" of the deed of trust is more than the amount actually owed by the debtor at the time of the sale. The Trust further creates its own version of "facts", asserting in its appellate brief that "the foreclosure price was the face amount of the first deed of trust (238,000)...which Mr. Hayes promised to pay".

(Appellate Brief, page 26)

Under the statutes governing non-judicial foreclosure proceedings, the “face value” of the deed of trust is not relevant. The Notice of Trustee’s Sale required under RCW 61.24.040 makes absolutely no mention of the “face value” of the deed of trust. Instead, RCW 61.24.040 requires that the Trustee set forth the sums currently outstanding on the debt. In accordance with that statute, the Notice of Trustee’s Sale sent to the Trust specifically set forth the amount of the debt, listing the basis of the default as being the failure to pay a balloon payment of principal and interest in the amount of \$48,775.57.

Nor is the “face value” of the deed of trust of any relevance at the trustee’s sale. RCW 61.24.070(2) provides in pertinent part that “the trustee shall, at the request of the beneficiary, credit toward the beneficiary’s bid all or any part of the monetary obligations secured by the deed of trust.” The “face amount” of the deed of trust has no relevance to this procedure, nor does a beneficiary “tender” the deed of trust at the sale. Instead, as set forth in the statute, any or all of the outstanding indebtedness secured by the deed of trust can be credited toward the purchase price as part of the beneficiary’s bid.

Pursuant to this statute, the Hayes instructed the trustee to credit the then outstanding obligation secured by the deed of trust as their bid at the sale. As no other bidders appeared at the sale, the Hayes were the successful bidders at the sale. There were no “surplus proceeds” resulting from the sale.

The Trust’s arguments, advanced before both the Trial Court and in its appellate brief, are wholly frivolous and without any legal or factual foundation. Moreover, it must be noted that the Hayes, or any other successful bidder at the sale, could never have any legal obligation to “account” to the Trust for any funds following the sale, even if there somehow had been a “surplus”. Instead, RCW 61.24.080(3) provides that if there are any surplus funds from the sale the trustee as the recipient of the surplus funds, not the successful bidder, is to prepare a written notice of the amount of the surplus and deposit the surplus funds into the registry of the Court. The Trust’s claim for an accounting from the Hayes, instead of from the trustee, was thus all the more frivolous for being directed against a party with absolutely no statutory duty to account for the proceeds from a trustee’s sale.

3. The Court Did Not Err In Dismissing The Trust's Claims For Fraud And Civil Conspiracy With Prejudice – And The Trust Never Asserted A Claim For Unjust Enrichment.

The Trust's second assignment of error is that the "Trial Court erred in dismissing the Bert Kutu Trust's claims for fraud and civil conspiracy with prejudice, over the Bert Kutu Trust's objection and request that the claims be voluntarily dismissed without prejudice." (Page 2 of Appellate Brief) In the next section of its brief, entitled "Issues Pertaining to Assignments of Error", the Trust lists as Issue #4 a question regarding the dismissal of its claims with prejudice over its objection and in the face of its request to voluntarily dismiss the claim without prejudice. However, having assigned error to and framing a question regarding the dismissal with prejudice of its fraud and civil conspiracy claims, the Trust devotes absolutely no portion of the Argument section of its brief to this issue.

Instead, after briefing its first assignment of error - that the Trial Court erred in dismissing its claims for an accounting of the proceeds from the foreclosure sale - the Trust at page 31 of its Appellate Brief presents a section entitled "There is a Triable Case on Bert Kutu Trust's Unjust Enrichment Claim". In this section of its brief the Trust claims to have amended its original complaint to

include a claim for unjust enrichment (page 33 of Appellate Brief) and then asserts that “as with the accounting claim, this claim presents triable issues distinct from underlying fraud.” (Page 34 of Appellate Brief)

The Trust does not actually state anywhere in this section of its brief that the Trial Court erred in dismissing the alleged “unjust enrichment” claim, and indeed devotes almost no argument to support the alleged unjust enrichment claim beyond a brief listing of the elements of unjust enrichment. Nor did the Trust assign error to the dismissal of the alleged unjust enrichment claim in the Assignments of Error section of its brief or identify an issue regarding the dismissal of the alleged unjust enrichment claim in the Issues Pertaining to Assignments of Error section of its brief. However, in view of the fact that the Trust devotes an entire section of its brief to the alleged “unjust enrichment” claim, while devoting no portion of the Argument portion of its brief to the dismissal of its fraud or civil conspiracy claims, the Hayes can only assume that the Trust’s objections to the dismissal of its fraud or civil conspiracy claims somehow morphed between the Assignments of Error portion of its brief and the Argument portion of its brief into a claim

that the Trial Court erred in dismissing the alleged unjust enrichment claim.

Setting aside the Trust's failure to assign error to any dismissal of an unjust enrichment claim, the most obvious defect in the Trust's argument on this point is that the Trust never asserted a claim for unjust enrichment against the Hayes. There was no such claim in the original complaint. (CP 1-8) Nor, despite the Trust's assertion at page 33 of its Appellate Brief, was there any such claim in the Trust's amended complaint. (CP 259-267) The only new claim asserted in the amended complaint was for an accounting of the proceeds from the foreclosure, paragraphs 7.1-7.6 of the amended complaint. Paragraphs 7.1-7.6 were in fact specifically identified as the only new sections in the amended complaint in the Trust's motion to amend its complaint. And the Trust's attorney specifically noted in a declaration submitted to the Trial Court that "the amended complaint added only the claim for an accounting." (CP 300)

Nor did the Trust ever raise any arguments regarding a supposed unjust enrichment claim in response to the Hayes' motion for summary judgment. Instead, as noted above, the Trust, while opposing the dismissal of its claim for an accounting of the

proceeds from the foreclosure, raised no objection whatsoever to the dismissal of its remaining claims, which were for fraud and civil conspiracy. (CP 289-298) The only issue the Trust raised regarding the dismissal of those claims was that the Trust wanted the dismissal to be without prejudice – which is exactly the issue it identifies in its assignments of error. But, as noted above, despite assigning error to the issue, the Trust thereafter completely abandoned the issue, providing absolutely no briefing on the discussion of the issue in its brief.

Absent manifest constitutional error, the Court of Appeals does not consider a theory raised for the first time on appeal. RAP 2.5(a); Brown v. Labor Ready NW, Inc., 113 Wash.App. 643, 655, 54 P.3d 166 (2002). Not only did the Trust not raise any argument regarding unjust enrichment in response to the Hayes' motion for summary judgment, the Trust never even asserted such a claim in either of its two complaints against the Hayes. Having failed to raise the issue before the Trial Court, the Trust is not entitled to have its new arguments regarding unjust enrichment considered by this Court.

Nor, even if the Trust had not abandoned this claim by failing to brief it in the Argument portion of its brief, did the Trial Court error

in dismissing the Trust's fraud and civil conspiracy claims with prejudice. It is undisputed that, despite the specific representations to the contrary in the Trust's two complaints, the Hayes have never met or even spoken with the Trust's trustee, much less made any representations to him. Indeed, the Hayes had no involvement whatsoever with the original loan transaction, only purchasing the original lender's interest in the note and deed of trust some weeks later as an investment vehicle. The Trust raised no issues of fact, much less material fact, regarding these claims, which were therefore properly dismissed by the Trial Court.

4. The Court Did Not Err In Awarding Fees As Sanctions Against The Trust Under CR 11 and RCW 4.84.185.

RCW 4.84.185 provides as follows:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge

shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

RCW 4.84.185 was enacted to discourage abuse of the legal system by providing for award of expenses and legal fees to any party forced to defend itself against meritless claims asserted for harassment, delay, nuisance or spite. See Suarez v. Newquist, 70 Wn. App. 827, 855 P.2d 1200 (1993). A lawsuit is frivolous and supports an award of attorney fees when it cannot be supported by any rational argument on the law or facts. See Smith v. Okanogan County 100 Wn.App. 7, 994 P.2d 857 (2000).

Civil Rule 11 states in pertinent part as follows:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum; that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

A court may award CR 11 sanctions if an action is not well grounded in fact or warranted by existing law and the attorney or pro se litigant who signed the pleading failed to conduct a reasonable inquiry into the action's factual or legal basis. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220, 829 P.2d 1099 (1992).

The Trust's claims against the Hayes were both legally and factually frivolous. While the Trust's attorney claims to have undertaken a "detailed month and a half long investigation" prior to filing the original complaint, the Trust and its attorney were in fact provided, on two separate occasions prior to the filing of this lawsuit, with documentation showing that the Hayes were only foreclosing on the debt actually owed under the promissory note, not some inflated amount as alleged in the complaints. Yet the Trust and its attorney nonetheless included allegations that the Hayes had foreclosed on an inflated amount in both its complaints as the basis for the Trust's conspiracy and fraud claims against the Hayes.

The Trust and its attorney also twice alleged, in both the original complaint and the amended complaint, that Mr. Hayes made affirmative misrepresentations to the Trust's trustee prior to its sale of the property to New Enterprise, despite the undisputed fact that the Trust's trustee has never even met the Hayes or spoken with them. It is in fact wholly undisputed that the Hayes

had no involvement in the original transaction and only acquired their interest in the deed of trust after the property had been sold.

The Trust's attorney thereafter amended the Trust's complaint to seek an accounting from the Hayes, despite there being no factual or legal basis for such a claim. It has never been disputed that no funds were paid at the trustee's sale, and that instead the trustee, pursuant to RCW 61.24.070(2), credited the then outstanding obligation secured by the deed of trust as the Hayes' bid at the sale. Because there were no monies, let alone any surplus monies, paid at the sale, no accounting was required under RCW 61.24.080. Even had there been any dispute regarding those facts, any accounting would have been the responsibility of the trustee, not the Hayes, under the specific provisions of RCW 61.24.080.

None of the claims the Trust asserted against the Hayes could be supported by any rational argument on the law or facts, and the Trust and its attorney had full possession of the facts necessary to know this before filing their initial complaint, let alone their amended complaint. The Trial Court therefore properly concluded that the Trust's attorney "failed to adequately investigate or make reasonable inquiry into the facts supporting the [Trust]'s complaint, and further ignored the facts he did obtain and included clearly false claims in the two complaints he filed in this matter.

These actions constitute violations of Civil Rule 11.” The Trial Court further properly concluded that “the claims made by the [Trust] against the Hayes in its complaints herein were frivolous and advanced without reasonable cause.” (CP 343)

5. The Trial Court Made No Error In Awarding Reasonable Attorneys Fees to the Hayes.

The Trust asserts for the first time on appeal that the Trial Court failed to conduct a proper analysis in determining the amount of attorney’s fees to award to the Hayes. As noted above, absent manifest constitutional error the Court of Appeals does not consider a theory raised for the first time on appeal. RAP 2.5(a); Brown v. Labor Ready NW, Inc., supra. The Trust’s new arguments asserted for the first time on appeal regarding the amount of attorney’s fees awarded to the Hayes thus cannot be considered by this Court.

Moreover, there is no merit to the Trust’s new assertions on appeal. The Hayes submitted in support of their request for attorney’s fees their attorney’s declaration setting forth his hourly rate and the number of hours expended on the case. Attached to the declaration was a billing summary detailing how the time had been incurred. (CP 313-318) The Trust provided no response to this declaration and failed to in any way challenge the hourly rate spent by the Hayes’ attorney. The only challenge the Trust raised

to the amount of fees sought by the Hayes was based not on the reasonableness of the amount of time spent on the case by the Hayes' attorney, but was instead based on the declaration testimony of the Trust's attorney asserting that the Hayes award should be limited due to what he claimed were discovery delays caused by the Hayes that somehow served to increase the Hayes' fees. (CP 338)

Trial courts are not required to undertake an elaborate analysis under the process outlined by the Washington Supreme Court in Bowers v. Transamerica Title Ins. Co., 100 Wash.2d 581, 675 P.2d 193 (1983). In Bowers, the Supreme Court stated that

The trial court must determine the number of hours reasonably expended in the litigation. To this end, the attorneys must provide reasonable documentation of the work performed. **This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (i.e., senior partner, associate, etc.).** The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.

The total number of hours reasonably expended is multiplied by the reasonable hourly rate of compensation. **Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate.** The attorney's usual fee is not, however, conclusively a reasonable fee and other factors may necessitate an adjustment. See, e.g., Chrapliwy v. Uniroyal, 670 F.2d 760 (7th Cir.1982). In addition to

the usual billing rate, the court may consider the level of skill required by the litigation, time limitations imposed on the litigation, the amount of the potential recovery, the attorney's reputation, and the undesirability of the case. The reasonable hourly rate should be computed for each attorney, and each attorney's hourly rate may well vary with each type of work involved in the litigation.

Id. at 597 (emphasis added).

Under the process outlined in Bowers, the Trial Court normally need only consider the attorney's hourly rate and the time expended by the attorney to determine the reasonable attorney's fees to award. In the absence of any challenge by the party opposing the award, the hourly rate and the time spent will usually be deemed reasonable.

The Trust raised no challenge to either the hourly rate of or the time expended by the Hayes' attorney, and in determining that the attorney's fees sought by the Hayes were reasonable the Trial Court necessarily rejected the Trust's argument that the Hayes' fees should be limited due to an alleged delay in discovery. The Trust's belated attempt to challenge for the first time on appeal the process the Trial Court followed to award reasonable attorney's fees to the Hayes is wholly without merit and must be denied.

6. Request For Attorney's Fees And Costs.

Pursuant to RAP 18.1, the Hayes request that they be awarded their attorney's fees and costs incurred in this appeal.

RAP 18.9(a) provides that the Court may order a party who brings a frivolous appeal for the purpose of delay to pay terms and compensatory damages to the opposing party. Foisy v. Conroy, 101 Wn.App. 36, 43, 4 P.3d 140 (2000). An appeal is frivolous and brought for the purpose of delay where there are no arguable issues regarding which reasonable minds could differ, and the appeal is so devoid of merit that there is no reasonable possibility of reversal. Millers Cas. Ins. Co., of Texas v. Briggs, 100 Wn.2d 9, 15, 665 P.2d 887 (1983).

The Trust has not raised any debatable issues in this appeal. In accordance with RAP 18.1, the Hayes respectfully request that this Court award to them their attorney's fees and costs incurred in this appeal.

C. CONCLUSION

The Trust and its attorney had months to investigate the merits of the Trust's claims prior to filing its lawsuit against the Hayes. Indeed, the Trust and its attorney were provided, in response to their inquiries, with documentation proving that any suspicions they may have had that the Hayes were somehow involved in equity skimming fraud were without any factual basis whatsoever. Yet not only did the Trust and its attorney proceed

with this lawsuit, but they included in the complaint false allegations regarding claimed representations by Mr. Hayes to the Trust's trustee, and then months later amended the complaint to add an additional claim for an accounting that had absolutely no basis in law or in fact.

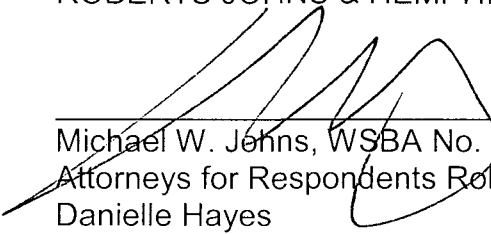
The Trial Court therefore properly dismissed the Trust's claims. The actions of the Trust and its attorney also clearly violated both CR 11 and RCW 4.84.185, and the Trial Court therefore properly awarded attorney's fees and costs to the Hayes. The Trust has failed to raise any debatable issues in this appeal, much less establish the Trial Court committed any error.

This Court should thus affirm the decisions of the Trial Court. The Court should further award the Hayes their reasonable attorney's fees and costs incurred in this appeal

Dated: May 23rd, 2012.

Respectfully submitted

ROBERTS JOHNS & HEMPHILL, PLLC



Michael W. Johns, WSBA No. 22054
Attorneys for Respondents Robert and
Danielle Hayes

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing Brief of Respondents Robert and Danielle Hayes on the following individuals in the manner indicated:

Benjamin D. Cushman	<input type="checkbox"/> U.S. Mail, Postage Prepaid
Cushman Law Offices P.S.	<input checked="" type="checkbox"/> Legal Messenger
924 Capitol Way S., Suite 203	<input type="checkbox"/> Electronic Filing
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Steven B. Madsen	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid
The Law Offices of Steven B.	<input type="checkbox"/> Legal Messenger
Madsen	<input type="checkbox"/> Electronic Filing
P. O. Box 269	<input type="checkbox"/> Facsimile
Cougar, WA 98616-0269	

Donald L. Anderson	<input type="checkbox"/> U.S. Mail, Postage Prepaid
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SIGNED this 23rd day of May, 2012, at Gig Harbor,
Washington.


KRISTINE R. PYLE

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